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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 627

JOSEPH H. BROMLEY,

Appellant
(Plaintiff Below)

against

BLAKELY D. McCAUGHN,
Collector of Internal Revenue for the First District of Pennsylvania,

Appellee
(Defendant Below)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

JOSEPH H. BROMLEY, Appellant, (Plaintiff Below), *against* BLAKELY D. McCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania. Appellee, (Defendant Below).	No. 635.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Sirs:

PLEASE TAKE NOTICE that upon the annexed motion for leave to file a brief as *amici curiae*, the undersigned will move this Honorable Court at the October Term, 1928, thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 8th day of April, 1929, at the opening of court on that day or as soon thereafter as counsel can be heard for permission to file the annexed brief as *amici curiae* in this case.

Dated, New York, April 1, 1929.

JOHN W. DRYE, JR.,
JOHN M. PERRY,
80 Broadway,
Borough of Manhattan,
New York City.

To:

THE HONORABLE, THE SOLICITOR GENERAL,
OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

IRA JEWELL WILLIAMS, JR.,
IRA JEWELL WILLIAMS,
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Attorneys for Appellant.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1928.

JOSEPH H. BROMLEY,
Appellant,
(Plaintiff Below),

against

BLAKELY D. MCCAUGHN,
Collector of Internal Revenue for the First District of Pennsylvania.
Appellee,
(Defendant Below).

No. 635.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for Abby F. Means, in the case of *Abby F. Means* v. *The United States,* now pending in the Court of Claims of the United States, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

There is now pending in the Court of Claims the case of *Means* v. *The United States,* No. H. 366, wherein the undersigned appear as counsel for the claimant. One of the issues raised in that case is the constitutionality of the gift tax provisions of the Revenue Act of 1924. The case was on the February trial calendar of the Court of Claims, but on being advised that the Circuit Court of Appeals for the Third Circuit had asked instructions of this Honorable Court upon the constitutionality of the

gift tax provisions of the Revenue Act of 1924 for its guidance in the case of *Bromley* v. *McCaughn*, the Court of Claims passed the Means case, pending the decision of this Honorable Court on the questions certified.

Counsel in the above-entitled case have consented to the filing of the accompanying brief.

WHEREFORE, motion is respectfully made for permission to file the accompanying brief.

JOHN W. DAVIS, JR.,
JOHN M. PERRY,
Attorneys for Abby F. Means.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

JOSEPH H. BROMLEY, Appellant, (Plaintiff Below), *against* BLAKELY D. McCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania. Appellee, (Defendant Below).	No. 635.

BRIEF AS AMICI CURIAE.

The discussion in this brief will be limited to the proposition that the Federal Gift Tax is a direct tax and, not being apportioned, is unconstitutional.

PROVISIONS OF THE CONSTITUTION AND THE STATUTES INVOLVED.

The Constitution, Article I, Section 2, Clause 3, provides:

> "Representatives and direct taxes shall be apportioned among the several States * * * according to their respective numbers."

Clause 9, subdivision 4, of the same Article, is as follows:

> "No capitation, or other direct taxes, shall be laid, unless in proportion to the Census or enumeration hereinbefore directed to be taken."

The pertinent provisions of Title III, Part II, of the Revenue Act of 1924 purporting to impose the Gift Tax, are as follows:

> "*Sec. 319.* For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly * * *.
>
> *Sec. 320.* If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or moneys worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purposes of the tax imposed by Section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

ARGUMENT.

The Gift Tax Law (Title III, Part II of the Revenue Act of 1924) was enacted by Congress in May, 1924, and was approved by the President on June 2, 1924. It purported to impose a tax theretofore unknown to our field of taxation. It was, as President Coolidge said at the time of signing the Act, "a further invasion of the rights of the citizen, both unusual in nature and of doubtful legality."

This Court declared unconstitutional the provisions of the Act making it applicable to gifts made prior to June 2, 1924, the date the Act was approved. *Blodgett* v. *Holden*, 275 U. S. 142, *McNeir* v. *Anderson*, 275 U. S. 577, *Untermyer* v. *Anderson*, 276 U. S. 440.

As to gifts made after the date the Act was approved, it is submitted that the tax is a direct tax and

void because not apportioned as required by Article I, Section 2, Clause 3, and by Article I, Section 2, Clause 4 of the Constitution.

The framers of the Constitution deemed the apportionment of direct taxes so important that it was "enforced by two provisions, one affirmative and one negative." The affirmative provision (Article I, Section 2, Clause 3) requires that:

> "Representatives and direct taxes shall be apportioned among the several States * * *"

The negative provision (Article I, Section 9, Clause 4) reads:

> "No capitation, or other direct tax shall be laid, unless in Proportion to the Census or Enumeration hereinbefore directed to be taken."

The Gift Tax was not apportioned and, if a direct tax, was in violation of these Constitutional limitations upon the power of Congress to tax.

(1)

A tax on property because of ownership is a direct tax.

This principle of law is well established.

In *Eisner* v. *Macomber*, 252 U. S. 189, this Court said in considering the tax on stock dividends (page 217):

> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the Company including its accumulated and undivided profits is equally clear. But that this would be *taxation of property because of ownership*, and hence would require apportionment under the pro-

visions of the Constitution, is settled beyond peradventure by previous decisions of this Court."

Again, in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, the Court stated at page 294:

> "To levy a tax by reason of ownership of the property is to tax the property."

(2)

The right to dispose of property by gift is an essential attribute or element of the ownership of property.

The right of disposal by gift is inherent in the ownership of property. The Court said in *Buchanan* v. *Warley*, 245 U. S. 60, at p. 74:

> "* * * Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and *dispose of it.* The Constitution protects these essential attributes of property." (Italics ours)

The definitions of property are reviewed and the fundamental law is clearly stated in *Wynehames* v. *The People*, 13 N. Y. 378, 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com., 138): 'The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Com., 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience

and mutual wants.' By another author, property is defined as an 'exclusive right to things, containing not only a right to use those things, but a *right to dispose of them*, either by exchanging them for other things, *or giving them away to any other person without consideration*, or even throwing them away.' * * * These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made." (Italics ours)

There can be no question but that the right of gift is an essential right of property. It is as much a right or incident of property as the right to sell. Yet property would be largely stripped of its value if the right of sale were taken away. The universally recognized right to dispose of property by gift stands in no different category. Value cannot always be measured in money. One man may find satisfaction in hoarding his money and property in miserly fashion; another may choose to use his resources for continual barter and sale; a third may find true compensation and full value in the pleasure and satisfaction of giving his property away. Certainly the right of gift is inseparable from ownership—as inseparable as the right to enjoy the rents and profits, to have possession or to sell.

(3)

A tax on an essential element of the ownership of property is a direct tax.

The whole always includes all of the parts. It follows logically that a tax on one of the essential elements of ownership is a tax upon the ownership of the property. To state the proposition is to prove it.

In *Pollock* v. *The Farmers Loan and Trust Company*, 157 U. S. 429, 158 U. S. 601, a tax upon an element of property, namely, the income therefrom, was held to be a direct tax. Chief Justice Fuller in his concurring opinion referred to indirect taxes and then concluded (157 U. S. 558):

> "* * * but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

And again at page 591 the Chief Justice stated the principle as follows:

> "It must be conceded that whatever affects *any element* that gives an article its value in the eye of the law affects the property itself." (Italics ours).

A tax upon the right to the possession of property was held to be a direct tax in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288; that is, that a tax on the right to take liquor from a bonded warehouse where it was required to be placed, was a direct tax. The right to possession is, as the right of disposal by gift, but one of the many essential elements of ownership.

This Court quoted with approval from the decision of the lower Court (page 294):

> "The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i.e., consumption, sale or keeping for future consumption or sale. * * * The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value."

Thompson v. *McLeod*, 112 Miss. 383, 73 So. 193, was cited with approval in the Kentucky Distilleries Case. The Mississippi Court held that a tax upon the extraction of turpentine from trees in the state was a property tax, pointing out in the course of its opinion (page 388) that:

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine-tree enjoys the same natural right to extract gum from the tree, as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

And we might add that it would be the same thing to require a privilege tax as a precedent right to give the grapes or pecans to his children or his spouse or to a hungry wayfarer who might pass his way.

In *Nicol* v. *Ames*, 173 U. S. 509, this Court held a tax upon the privilege of doing business at "exchanges", an indirect tax but Mr. Justice Peckham pointed out the distinction between the tax under consideration and tax on sales in general. The following is quoted from the opinion at page 521:

> "A tax on the privilege of selling property at the exchange and of using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

These cases clearly show the error of the conclusion of the learned Circuit Court of Appeals in *O'Connor* v. *Anderson*, 16 Fed. (2nd) 970, 973, that the Gift Tax law may be sustained as an indirect tax because—

> "It cannot be successfully contended that the right to give away property exhausts those interests which together constitute the rights of property. * * *"

It is submitted that there is no material difference between a tax upon the gift of property and a tax upon the income of property or a tax upon the right to possession of property or a tax on the general right of sale.

(4)

The Gift Tax may not be justified as an excise tax.

No definition of excise taxes has been found that includes the private transfer of property by gift; no definition has been uncovered that could be extended by implication or analogy to embrace such transactions.

In *Patton* v. *Brady*, 184 U. S. 608, 617, this Court reviewed the definitions as follows:

> "Turning to Blackstone, vol. 1, p. 318, we find an excise defined: 'An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.' This definition is accepted by Story in his Constitution of the United States, sec. 953. Cooley in his work on Taxation, page 3, defines it as 'an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities.' Bouvier and Black, respectively, in their dictionaries, give the same definition. If we turn to the general dictionaries, Webster's International calls it 'an inland duty or impost operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities.' The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Rev. Law, sec. 133: 'Excises is a

> word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

In *Thomas* v. *U. S.*, 192 U. S. 363, 370, Chief Justice Fuller, speaking for the Court, said:

> "There is no occasion to attempt to confine the words duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

All of these classes of excise taxes have a historical background. They were imposed as excises in England from whom we took our forms of taxation. While it may not be true that a tax must have been known as an excise tax at the time of the adoption of the constitution to receive that classification, its general character should be determined with reference to the known occasions of taxation falling into the two groups of direct and indirect taxes.

The gift tax has the attributes of a direct tax. A gift is an unilateral act. It is the exercise of an inherent right and not a privilege created by any special arrangement or act of sovereignty. The exercise of the right to give cannot affect or involve society detrimentally. The subject of the gift is *property* and not the special use or consumption thereof; the tax is on the donor and irrespective of whether the property is used or consumed by the donee.

What other inherent right relating to the "res" itself and not the consumption or special use thereof has, when exercised, been held to be a subject for the levy of an excise? In other words, an excise (which is a cutting out) is available only when predicated upon that which is

available by reason of a privilege created by special arrangement or act of sovereignty, or on account of use or consumption, or because of being affected with a public interest.

Inheritance, estate and succession taxes have been sustained on the theory that historically no man has the natural right to pass property by will or inheritance without the consent of the sovereign, and that the privilege exercised with the consent of the sovereign is subject to an excise tax. *U. S.* v. *Perkins*, 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust* v. *Eisner*, 256 U. S. 345.

Some of the special privileges incidental to business that have been made the subject of the excise tax are:

(1) On the privilege of selling tobacco, a consumable article: *Patton* v. *Brady*, 184 U. S. 608.

(2) On the privilege of doing business at "exchanges": *Nichol* v. *Ames*, 173 U. S. 509.

(3) On the privilege of disposing of property in the form of certificates of Stock under the corporation law: *Thomas* v. *U. S.*, 192 U. S. 363.

(4) On the privilege of carrying on of business in corporate form: *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

The distinction between these taxes and a tax on the right to give is obvious. The right to regulate business is wholly different from the right to tax the exercise of the ordinary and indispensable right to dispose of property by gift.

The tax in *Hylton* v. *United States*, 3 Dall. 171, upon which the appellee relies, was not a tax on the carriages but on expense or exhaustion through use thereof.

Mr. J. Chase said (p. 175): "It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable com-

modity, and such annual tax on it, is on the expense of the owner."

A tax on a foreign built yacht not actually used at all during the preceding years was not sustained. *Pierce* v. *United States*, 232 U. S. 290.

We have pointed out above that the Gift Tax is a tax on one of the essential elements or attributes of property which inheres in the ownership of property and that such a tax has been held to be a direct tax. It follows that the tax may not be justified by calling it a tax on a "transfer" or a tax arising by the event of gift or by attaching any other label associated with indirect taxes. Such artificial distinctions have no place in the field of practical taxation.

In *Dawson* v. *Kentucky Distilleries Co., supra*, this Court said (page 292):

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

In the *Pollock* case, this Court had pointed out in considering certain refinements of the argument:

> "But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."

And in its decision in *Kansas City Ry. Co.* v. *Botkin*, 240 U. S. 227, this Court said (page 235):

> "Undoubtedly, a tax may be in form a privilege tax, and, yet, in substance, may be a tax on property."

Furthermore, the Gift Tax may not be sustained as an aid to the enforcement of the Estate Tax Law.

A Wisconsin statute, imposing an estate tax upon gifts made in contemplation of death, provided that the presumption was conclusive that any gift made within

six years prior to death was so made. It was argued that this presumption was necessary to prevent evasion of the Estate Tax. This Court rejected the argument and held the Act unconstitutional. *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240.

In the recent case of *Nichols* v. *Coolidge*, 274 U. S. 531, Mr. Justice McReynolds said at p. 541:

> "But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them."

To summarize, as Judge Augustus M. Hand said in his opinion in *McNeir* v. *Anderson*, 10 Fed. (2nd) 813, 814:

> "If there is anything left of the general views of the Court in Pollack *v.* Farmers Loan & Trust Co., 158 U. S. 601, as to the nature of so-called direct taxes, a tax upon a gift not made in contemplation of death and not to take effect upon death would seem to be necessarily a direct tax imposed upon the donor purely as the owner of property."

CONCLUSION.

In conclusion, it is respectively submitted that the provisions of Title III, Part II, of the Revenue Act of 1924, are unconstitutional.

JOHN W. DRYE, JR.,
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Amici Curiae.